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No. 275

In the

Supreme Court of the United States

OCTOBER TERM, 1968

~~D. SPENCER CROW and~~
C. ORAN MENSIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KINSEY T. JAMES
7521 Spring Lake Drive
Bethesda, Maryland
Attorney for Petitioner

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

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To The Honorable, The Chief Justice and Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit entered on March 18, 1968, affirming the judgment of the United States District Court for the Eastern District of Virginia at Richmond, Virginia, finding the petitioner guilty of various violations of Title 18, Sections 2, and 1341, United States Code, and sentencing him to the custody of the Attorney General of the United States for a period of five years.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Eastern District of Virginia at Richmond, Virginia, was affirmed by the United States Court of Appeals for the Fourth Circuit, one judge participating in the hearing died before the opinion was prepared, this opinion was filed March 18, 1968, and is not yet reported, but is set forth in Appendix A.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit was entered on March 18, 1968 and appears in the Appendix hereto. A timely petition was filed for rehearing and was denied on June 3, 1968, which denial appears in the Appendix hereto. The jurisdiction of this Court is invoked under Title 28, Section 1254 (1), United States Code.

QUESTIONS PRESENTED

I. Was not this defendant prejudiced by being obliged to proceed to trial without counsel; and, did not the Court abuse its discretion in this respect in derogation of Art. VI of the Bill of Rights; and, was not this defendant, while acting pro se, prejudiced in his defense by the Court's remarks and remonstrations?

II. Was not the defendant's constitutional right to be present at every stage of the proceeding including the impaneling of a jury violated, as his "voluntary absence" was coerced?

III. Was not this defendant seriously prejudiced by being required to be tried jointly with Grow and McGurren; and, did not the Court's conception of "scheme" as equivalent of conspiracy also redound to the prejudice of the defendant in violation of Art. V of the Bill of Rights?

IV. Was not the evidence in this case insufficient to sustain conviction?

STATUTES INVOLVED

Section 2 of Title 18, United States Code:

Principals. (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended October 31, 1951, ch. 655, Sec. 17b, 65 Stat. 717.

Section 1341 of Title 18, United States Code:

Frauds and swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, ch. 645, 62 Stat. 763, amended May 24, 1949, ch. 139 Sec. 34, 63 Stat. 94.

STATEMENT OF THE CASE

This case presents a factual situation clearly involving petitioner's constitutional guarantees under the Bill of Rights. Specifically, Articles V and VI. The first guarantee being: No person shall be . . . deprived of life, liberty, or property without due process of law . . . The second guarantee being: . . . the accused shall enjoy the right to a speedy and public trial . . . and have the assistance of Counsel for his defense. This issue is presented to this Court by reason of defendant C. Oran Mensik's petition that the trial Court, in its conduct throughout the trial, abused its discretionary powers in violation of petitioner's rights and the Circuit Court of Appeals affirmed such conduct by the trial Court presenting an opinion at variance with the holdings of other Circuits and contrary to the decided cases of this Honorable Court.

This case deals with the mailing of corporate letters by the Security Financial Insurance Corporation and the Commercial Savings and Loan Association during the year 1961. This case was tried in 1963 and the appeal was argued on October 8, 1964. The Circuit Court of Appeals did not render its decision until some three and one half years later on March 8, 1968.

The case was started in Baltimore, Maryland on October 11, 1963. Motions were made by this petitioner for severance and for a change of venue because of apparent prejudice prevailing in the District of Maryland, all of which motions were denied. Eight days were consumed in selecting twelve jurors and two alternates. The jury was impaneled and consisted of eleven (11) colored men and one white female juror. The trial Court then granted the motion for change of venue!

This petitioner moved to have trial Judge Roszel C. Thomsen disqualify himself by reason of statements by the judge indicating a prejudice to "foreigners". This petitioner was offended and being the only foreign-born defendant, asked his then counsel to make the motion. When his lawyer refused, this petitioner was forced to make the motion pro se. The motion was denied and the case was transferred to Richmond, Virginia. This petitioner's difficulty with counsel was further aggravated, by a breakdown in communication of facts and petitioner's understanding that if the case were removed from Baltimore to Richmond, a new and impartial judge would hear the case, and new and fair prosecutors would be appointed. It was in reliance upon this that petitioner agreed to the transfer to Richmond at a time he was having difficulty with his then counsel and appeared in Court before Chief Judge Sobeloff, afflicted with influenza, under medication and not knowing the full facts. When told that Judge Thompsen was following the case and would sit in Richmond, this petitioner "fired" his lawyer and immediately sought the services of other counsel. (See affidavits of such other counsel presented to the Court of Appeals, Appendix)

Upon removal to Richmond, Virginia, this petitioner immediately asked for a continuance to enable him to obtain counsel. The trial judge was adamant in his refusal to grant any time for the exercise of this vital right. As a result this petitioner was simultaneously acting pro se and *forced to leave the trial* most of the time and go out on the streets of Richmond in his efforts to obtain counsel. His dilemma became the more crushing as each lawyer he interviewed advised that, without a continuance, it would not be possible for any attorney to enter the case and provide a proper defense under such extraordinary circumstances. This petitioner's then counsel was sitting

outside the bar, while proceedings were continuing, and was awaiting action by the Court of Appeals on a writ of mandamus which he had filed seeking release from the case and permission to return to his home and law practice in Chicago, Illinois.

The trial had reached its tenth day when petitioner obtained the services of Kinsey T. James, Esquire, a Washington, D.C. attorney who came down to Richmond and entered his conditional appearance in the case. **The trial judge refused to grant any continuance to Mr. James even though the prosecution had already put on its principal witnesses and offered Government Exhibits #1 through #38.**

REASONS FOR GRANTING THE WRIT

It is axiomatic that—in furtherance of the interests of justice—the Supreme Court exercises both its judicial and its supervisory powers to correct—when warranted—the judicial errors and abuses of discretion which—whether through inadvertence or by mistake—results in unconstitutional deprivations of life, liberty or property without *due process of law and in violation of the Bill of Rights.*

This is such a case.

The supervisory powers of this Court are such that it can inquire into and unwork what can be properly viewed as a violation of this petitioner's right to a fair and impartial trial. Since Due Process is an absolute constitutional guarantee, under the "Bill of Rights," the conduct of the prosecutor including representations made on brief to the Court of Appeals for the Fourth Circuit are subject to inquiry upon review. Statements by the prosecutors when couched in language either calculated to mislead or so ambivalent in construction as to cause a misleading of the Appellate Court, become the more critical when such incorrect statements are relied upon. This case presents such unusual circumstances.

With reference to question number one, this petitioner was in fact, forced to represent himself and at the same time presented with an impossible task of obtaining counsel. This cause was removed from the District Court of Maryland and transferred from Baltimore to Richmond on Friday, October 25, 1963 and trial was ordered to commence on Monday, October 28, 1963. On that day, the defendant Mensik advised the Court: "Mr. Calihan and I have come to an impasse where I have discharged him as my attorney as of Friday of last week." There was really

no urgency for immediate trial of this case. Approximately 100 lower numbered cases were on the Baltimore docket when this case was called on for trial. All of the defendants were on bond and the alleged crime dates were as early as 1959, some years before. The crime was not one of violence. If the Court felt that the defendant Mensik was not sincere in his protestations that he and his counsel had reached an impasse there was ample time and opportunity for the Court to have a hearing on the matter. Yet in spite of repeated motions for continuance culminated by the filing of an emergency writ of mandamus by Attorney Edward J. Calihan in the Circuit Court of Appeals seeking to be relieved from the case and permission to return to his home and law practice in Chicago, Illinois, and still no continuance was granted. The trial judge agreed to the withdrawal of Calihan and the conditional appearance of Mr. James, an attorney from Washington, D.C., but still refused to grant a continuance of even one hour!

It is to be noted that this case involved alleged mailings as long ago as 1959, nearly ten years ago, and the *Circuit Court of Appeals took more than three and one half years to render its verdict,* having heard argument on October 8, 1964.

The conditional appearance of Mr. James was entered some ten (10) days after the trial started. Prior to this entry by Mr. James the following proceedings had already taken place:

(a) Attorney Calihan filed motion to be relieved as counsel for Mensik.

(b) Defendant Mensik asked leave to obtain new counsel.

(c) Defendant Mensik asked continuance of case, trial court refused to grant any continuance or extension of time for defendant Mensik to obtain counsel.

(d) Attorney Calihan renewed his motion to withdraw, denied by trial judge.

(e) Attorney Calihan filed petition in Circuit Court of Appeals seeking mandamus order that trial Judge Thomsen be required to allow Calihan to withdraw as counsel.

(f) Defendant Mensik renewed motion that trial Judge Thomsen be disqualified by reason of bias and prejudice.

(g) For the second time, the examination of jurors on voir dire, was completed. (During part of the session defendant Mensik was outside the courtroom seeking new counsel because of the urgent circumstances he was faced with.)

(h) Opening statement by Prosecutor.

(i) Defendant Mensik forced by circumstances to make *his own* opening statement.

(j) Government put on its principal witnesses:

Gerald C. Jansek
C. Meredith Boyce
Robert Suchman
Carl A. Hulbert
Harold T. Applegarth

(k) Government Exhibits #1 through #38 were offered by the Government. (The main case of the government was already in)!

The prosecutors and the Court were aware of the severity of this petitioner's dilemma even on the very first day the proceedings commenced at Richmond when the following unique courtroom procedure took place as the jury was

being selected. (Vol. 1, Transcript of Record, Monday, October 28, 1963.)

> Mr. Mensik: Mr. Calihan is not with me any more.
> The Court: Mr. Calihan is counsel of record in the case and he will sit in the courtroom until you employ another counsel prepared to go ahead with the case.

Again on page 27 of the same Transcript later in the day:

> Mr. Mensik: I wanted to make it clear to you that Mr. Calihan is not my counsel and in the absence of counsel to be seelcted by me here in Richmond, I will act as my own counsel and, therefore, Mr. Calihan can be excused.
> The Court: He cannot be excused by the Court until the matter is clarified a little more fully, as I have indicated the various possibilities. If you do not wish him to sit at the trial table—
> Mr. Mensik: I do not wish him to sit.
> The Court: We will find a comfortable seat somewhere else in the room . . .

The bizarre spectacle that followed was incredible! Petitioner's counsel was directed by the trial judge to sit outside the bar with the spectators! The trial proceeded with this petitioner acting pro se and presented with such an emergency that between the times he sought counsel outside the courtroom he was forced repeatedly to attempt to resolve this dilemma with an adamant Court. During this period counsel Calihan was awaiting action on the writ of mandamus he had filed in his attempt to be permitted to leave Richmond, Virginia and go back home to Chicago, Illinois.

That this affiant was not "intentionally or knowingly responsible" and in no way planned, provoked or arranged in any manner such a *scheme* as is suggested and alleged by the prosecutors with regard to getting rid of counsel

so that he would be without a lawyer can be shown. The full facts are quite to the contrary and the record shows at page 494 of the Transcript on Wednesday, October 30, 1963 even before the jury was picked, this affiant pleaded with the trial Judge for a postponement and time to get counsel and asked that then-counsel Calihan be excused because of having difficulties to the point of not being able to even get along as client and lawyer, yet the trial Court refused absolutely to grant any continuance and stated:

> The Court: I am sorry, sir, *I am afraid that is your problem.* You have had it . . . (Emphasis supplied)

It is respectfully submitted that such language by the trial Court was in this case a remonstration which in effect coerced this petitioner and destroyed any "voluntary" aspect to his enforced absences during the course of this trial.

With reference to question number two this petitioner earnestly requests that this Court give serious consideration to his right to be present at every stage of his trial and submits that his "voluntary absence" at the impaneling of the jury was coerced. It is to be noted that the attitude of the prosecutor is also a part of the record.

> "• • • The Court: • • • Do I understand the Government would prefer to select the jury today rather than to wait until Monday to see whether Mr. Mensik has local counsel?
> Mr. Sachs: Yes, Your Honor."

The prosecutor not only abandoned his obligation toward the defendant but urged the Court to continue proceedings. In this connection it is significant that both the prosecutor and the trial judge were fully aware of this petitioner's dilemma because it is in the record:

> "Mr. Mensik: I realize that but I brought up the fact Monday that Mr. Calihan and I are at an impasse.

I have been making efforts to get local counsel. These proceedings here are strange to me in sense. *I do not want to* agree to things that might destroy *or give up rights* that I could use in the future and all I can say at this moment is I have nothing to say on this.

Judge Thomsen: Thank you." (Emphasis supplied)

With reference to question number three, it is the petitioners serious contention that his motion for "severance" was arbitrarily denied. This defendant was seriously prejudiced by being required to be tried jointly with Grow and McGurren, and by the trial Court's conception of "scheme" as being the equivalent of conspiracy.

The Appellate Court's decision also reflects the feeling of that Court that a mail fraud scheme is equivalent to a conspiracy caes, and wrongfully affirmed the trial Court position that any party to the "scheme" was responsible for the words and actions of *every* other person indicted. Upon this theory the evidence against Grow, as well as against Boone, Ellicott and McGurren, (who was dismissed by directed verdict) was allowed to stand as to this petitioner. On that theory conviction followed. Thus the setting up and internal operations of S.F.I.C. were admitted against C. Oran Mensik without foundation. The *hearsay* allowed on the trial Court's "conspiracy" theory was equally devastating. Illustratively, Applegarth a principal government witness, was allowed to testify that Grow had *"told him"* that Mensik *"had told"* Grow that Gordon Boone was a very prominent politician and powerful in Maryland and they wouldn't have any more political problems with insurance if they got their insurance from S.F.I.C. It was by such hearsay device that the only question as to the responsibilty of Commercial, (Count 7) found its way into the record. When Commercial applied for insurance, the correspondence file was brought to Culver by Boone, Elli-

cott, and Suchman. Culver, another principal government witness (also a defendant who changed his plea), testified he demurred at giving Commercial insurance because Commercial was under indictment.

With reference to question number four, it is the position of this petitioner that the evidence in this case is insufficient to sustain conviction.

In view of the Appellate Court's dismissal of Count 3 upon appeal, as to defendant Grow, it is earnestly requested that this Honorable Court consider the findings as to defendant Mensik, as to Count 6, 7, and 8 and apply this same criteria or standard of proof. With respect to defendant Mensik, the record is clear that the sender of the letter, in Counts 6, and 8, is in no way identified with this petitioner. H. M. Ferrari, the alleged sender of the letter in Count 7 is unknown to this petitioner and was *not called* as a witness in the case, although the prosecutor assured the Court this would be done. This is another example of misleading this petitioner and the Court, either by design or inadvertence. The result is the same because this petitioner at the time was without counsel. Had petitioner had counsel, objection could have been made that the letter sent out by H. M. Ferrari (see letter in full on pages 34 and 35 of the Appellate Court's decision) did not in any way refer to the brochure entitled "Questions and Answers about Savings Insured by Security Financial Insurance Corporation" *specifically charged* and set out in Count 7 of the indictment. The jury could have been shown that the letter on its face is *at variance* with Count 7 and objection made to the admission of such evidence against this petitioner. It is requested that this Count letter be compared with Count 7, of the indictment (page 68) of the Appellate Court's decision.

1. *The record is void* of showing that Mensik was an officer, employee or agent of any of the corporations involved.

2. *The record is void* of showing that Mensik was a member of the Board of Directors or attended any meetings of the Board of Directors of any of the corporations involved.

3. *The record is void* of showing any nominee or agent for defendant Mensik as a stockholder, officer or director.

4. *The record is void* of showing a trust or trustee holding any stock for the interest of Mensik.

5. *The record is void* of showing that Mensik had desk space, sent any letters, entered into any contracts or leases, signed checks or any documents or that he devoted any time as one who owned, controlled or dominated any of the corporations involved.

6. *The record is void* of showing any compensation to Mensik or that he received one penny in salaries, fees, dividends or any monies from any of the corporations involved.

7. *The record is void* of corroboration and *none* of the *more than 200* documents and exhibits offered by the government was directed to Mensik *and further his name does not even appear in any document, check, report, letter or exhibit in this case!*

The Government's proof failed to show that Mensik owned any stock in any of the corporations involved. Mensik lived in Illinois and had his full time business occupation there. The record in this case is devoid of evidence that Mensik possessed either legal or actual capacity to control, dominate or cause actions of or by SFIC or any of the loan associations. Knowledge and wilfulness and

intent are essential elements required to be proved in all criminal cases under our judicial system of due process of law. It is a fundamental concept in our system of jurisprudence that each defendant must be found guilty as an individual and the Courts at all levels have rejected the contrary doctrine of "guilt by association". The Supreme Court of the United States makes this clear in a land mark case, *Kotteakos* v. *United States,* 328 U.S. 750, 772 (1946), where the Court said:

> "Guilt with us remains individual and personal, even as respects conspiracy. It is not a matter of mass application."

> Again in *Scales* v. *United States,* 367 U.S. 203, 224 (1961) Affirming this Court, 206 F. 2d 21, (1958), "In our jurisprudence guilt is personal . . ."

The prosecution's constant attempts to "throw" Mensik in with the acts and conduct of others outside his presence, and the virtually unlimited hearsay testimony is clearly violative of the concept that guilt is individual and not a matter of mass application. The piling of inference upon inference or inferring that circumstances are suspicious has given rise to comment by many Courts. In this case the Court of Appeals, in dismissing Count 3 as against defendant Grow gave lip service to this principle but failed to apply this same standard as to petitioner Mensik in Counts 6, 7, and 8. The Court stated at page 32 in its opinion (see appendix):

> ". . . An inference is a logical deduction or conclusion from established fact. * * * [C]harges of conspiracy are not to be made out by piling inference upon inference. * * * When the first or basic inference is impermissibly drawn it cannot thereafter serve to support other inferences upon which a subsequent finding is based."

The Court of Appeals failed to apply "its own' standard as to this petitioner. The trial Court allowed the jury to "pile inference upon inference", and the verdict was impermissibly drawn.

There is no evidence that Mensik owned any shares of stock either in his own name or by a nominee. There is no evidence he held any office or position with the various savings and loan attributed to him and what is more important there isn't any evidence of a single dollar coming to Mensik by way of income. Every indicia of domination or control is missing in this fact picture. The meanings attributed to these words are many. Thus, the defendant was forced to run this gamut of meanings described in the two words in order to defend himself. This was in violation of Art. VI of the Bill of Rights.

That the Court has been misled either through inadvertence or design on the part of the prosecutor can be shown. Allegations on brief by the prosecutors which were accepted by the Court of Appeals and stated in its opinion almost verbatim clearly demonstrates a misleading that goes to the heart of Due Process.

Prosecutor's Brief on Appeal—Page 32	The Circuit Court of Appeals Opinion—Page 51
"Mensik contends that a 'growing disagreement' between him and Calihan was made known to the Court on October 16, 1963. The record reveals no such communication . . ."	. . . Mensik asserts that a "growing disagreement" between him and Calihan was made known to the Court on October 16, 1963 but we find nothing in the records to support this charge . . .

That the prosecution did not present the full and true facts on brief is shown by an admission by the trial judge which makes crystal clear the misleading by government

counsel because this petitioner did communicate his growing disagreement to the Court in chambers and in part "on the record".

That the prosecutors knew such a statement on brief could be misleading is shown by the following admission made on November 4, 1963 by trial Judge Thomsen, wherein the Court admits his knowledge of the disagreement "several weeks" before, is found in the Transcript of Trial, Vol. 6, pp. 556 and 560:

> Mr. Calihan: Your Honor, I think I disassociated myself in a measure in that proceeding when I stepped up before the bar of that Court and said Mr. Mensik had a motion to make pro se, and he made it to your Honor.
>
> The Court: Then, as a result of that I went over all of the previous rulings and I made rulings, I believe, on all motions that have been filed. *When I first heard* that *there were difficulties* between Mr. Mensik, which was—I do not know how many days ago now—*but, certainly several weeks,* I said that he would have—that could not be reason for postponing the case. I think that has been made clear to Mr. Mensik . . .. (Emphasis added)

This case presents the unbelievable situation wherein the proceedings continued when the defendant himself was not present in Court and as here his then counsel, whom the trial judge refused to release, was not even in the courtroom while trial proceedings were going on!

> "Mr. Calihan: Your Honor, I would like to add one thing without again elaborating on what Mr. Morgan said. *I was not present yesterday* during what occurred here and I have not had a chance to look at the transcript and for that matter, my concern and what I am concerned with is only to the extent that is another instance of the breach between Mr, Mensik

and myself. It goes to *basic considerations* on the defense of this case. *I do not agree.* I could not have anything to do with the type of defense that Mr. Morgan talks about. This is one of the many facts of our disagreement, Your Honor, and I think, under the circumstances, it is *utterly impossible for me to represent Mr. Mensik.* I have lost all control over him to the extent he will not heed my advice and that, in a sense, is a greater factor for *my wanting to withdraw at this time.*" (Tr. 679) (Emphasis supplied)

This petitioner could not contend with the dilemmas forced upon him by the trial judge. It becomes more apparent when the Court of Appeals adopted the trial Court's position when it stated that "it is clear from the record that he was intentionally and voluntarily absent and that he was represented by Calihan". This same appeals court after "chambers hearing" released Calihan and allowed the substitution of Mr. James, with Judge Boreman commenting "Half a lawyer is better than none"! It is to be noted that attorney Calihan had not only been "fired" but was personally seeking an order by way of an emergency "writ of mandamus" directing the trial judge to release him and allow him to go home to Chicago, Illinois. The attorney-client relationship was completely ruptured. The trial judge refused to grant continuance to allow petitioner to obtain counsel. At times the defendant was out of the courtroom and at other times his then-counsel was not present!

VIOLATIONS OF BILL OF RIGHTS

The Bill of Rights is the cornerstone of law in these United States of America, and guarantees all citizens certain rights when involved in legal proceedings. In looking at the decision of the Court of Appeals for the Fourth

Circuit and the transcript of the trial which was conducted by the Trial Judge of the Maryland District Court, time after time, motion after motion, witnesses and exhibits were allowed into the record over the objection of affiant C. Oran Mensik, who at times was force to act *pro se* in derogation of his guaranteed rights as a citizen under Article 6 of the Bill of Rights which was framed by the founders of these United States. For the reasons set out hereinabove this petition for Writ of Certiorari should be granted.

CONCLUSION

This petitioner earnestly requests that this Honorable Court, in the interest of justice, exercise its full power of Appellate supervision, and give earnest consideration to the "extraordinary" circumstances here presented, which, if petitioner had been allowed to present upon a grant of rehearing by the Court of Appeals, could have caused that Court to have reached a different decision. Upon petition for rehearing such proffered proof was not allowed to be heard.

The decision of the trial Court has so far departed from the accepted and usual course of judicial proceedings as to violate "due process" of law and the Circuit Court of Appeals has sanctioned such departures, in derogation of the Bill of Rights. The "full facts" of this case have not been judicially considered, and this petitioner, under the rights guaranteed to him by the constitution and the amendments thereto, is entitled to such full consideration. The reason such "full facts" were not entered into the record goes to the very heart of Due Process. This petitioner was forced because of unusual circumstances to act

pro se and simultaneously make every effort to obtain counsel while his trial was under way. Being unable to get a continuance of any kind made it impossible for petitioner to be in Court so that a *full record* could be made. Petitioner's efforts to obtain counsel were sincere and it is respectfully submitted that the Appellate Court has been misled because the full facts were not before it by reason of the extraordinary circumstances here present.

Wherefore, it is earnestly requested that this Honorable Court in the interest of justice, direct that the verdict and judgment herein be set aside, or that a new trial be ordered to unwork what is manifestly a violation of this petitioner's guarantees under the Bill of Rights and Constitution of these United States.

Respectfully submitted,

KINSEY T. JAMES
7521 Spring Lake Drive
Bethesda, Maryland
Attorney for Petitioner

June 19, 1968

State of Illinois }
County of Cook } ss.

AFFIDAVIT OF C. ORAN MENSIK

C. ORAN MENSIK, being first duly sworn on oath, deposes and states:

That your affiant is an appellant in Cause No. 9412 in the United States Court of Appeals for the Fourth Circuit, on appeal from the United States District Court for the Eastern District of Virginia, and is making these statements under oath in connection with that cause and asks this Court to incorporate such affidavit with his petition and motion for rehearing by this Honorable Court, together with such evidence that was not before the Court by reason of affiant having been forced to act pro se at the trial.

The extraordinary circumstances in this case began at the pre-trial stage when this affiant was prejudiced by remarks of the trial judge in proceedings at Baltimore, Maryland. Affiant was not born in the United States, but is a citizen, and the statements of the trial judge evidencing his attitude of prejudice against "foreigners" was offensive to this affiant who sought to bring a motion that the judge excuse himself from the case. Affiant's then counsel refused to make such a motion, whereupon this affiant made the motion himself. This disagreement with counsel immediately reached a point where communication between lawyer and client reached an impasse.

The trial judge refused to excuse himself from the case and refused to grant motions for a change of venue. Trial proceedings commenced in Baltimore and a jury was picked. This jury consisted of eleven (11) colored men and one (1) white female juror. Whereupon the trial Court granted a change of venue! This order was based upon purported grounds that the District of Maryland had re-

ceived undue publicity about this case and therefore the possibility of bias and prejudice could affect the trial. It is to be noted that all prior motions setting forth this reason, as a basis for a change of venue, had been denied by this same Court. It is to be further noted that the composition of the jury was not challenged by this affiant but it was not until this jury was picked that the trial judge reversed himself and directed a change of venue.

At the time of directing the change of venue from Baltimore, Maryland to Richmond, Virginia, it was this affiants understanding that such procedure would include the assignment of a new judge and prosecutors to the case. The aggravation of affiant's disagreement with counsel had been compounded by the Court's refusal to grant continuance that affiant could obtain new counsel, so this affiant was quite distressed to learn that the removal to Richmond included the transfer of the same judge and prosecutors along with the case. When affiant appeared before Chief Judge Sobeloff, further extraordinary circumstances were present in addition to the client-counsel impasse. This petitioner was under medication, having influenza and completely unaware of the full facts and now represents to this Court that if he were aware of the full facts would never have agreed to such transfer of this cause.

VIOLATIONS OF BILLS OF RIGHTS

The Bill of Rights is the cornerstone of law in these United States of America, and guarantees all citizens certain rights when involved in legal proceedings. In looking at the decision of the Court of Appeals for the Fourth Circuit and the transcript of the trial which was conducted by Trial Judge of the Maryland District Court, time after time, motion after motion, witnesses and exhibits were

allowed into the record over the objection of affiant C. Oran Mensik, who at times was forced to act pro se in derogation of his guaranteed rights as a citizen under Article 6 of the Bill of Rights which was framed by the founders of these United States.

When trial Judge Roszel Thomsen of the Maryland District Court saw the makeup of the first jury selected in Baltimore consisted of eleven black men and one white woman, a proper jury qualified and accepted by the prosecutors and the defendants. It was only then that he agreed to transfer the case to Richmond, Virginia, from Baltimore, Maryland. Many questions are unanswered. Why the trial judge suddenly changed his mind as to where the trial should be held causes affiant to believe the trial judge was convinced he could not get a guilty verdict otherwise the case would have been transferred before the jury was picked. What ultimate motive was present? Was it to get a new jury that the trial judge could direct and control? Was the trial judge not satisfied with this first jury? Was the trial judge making a distinction of the jury already picked as contrasted with a jury in Richmond, Virginia, yet to be chosen? Was the reason for a change of venue really as stated and ordered by the trial Court to be because of possible prejudice if the trial were held in Baltimore—when this very ground was advanced twice before and overruled by the trial Court before the jury was selected?

The direction by the Court that the case start immediately at Richmond, Virginia, presented the crisis of obtaining counsel immediately which affiant attempted to do. Affiant made telephone calls to Richmond, Virginia, to eminent counsel but the dilemma presented by the Court's refusal to grant any continuance to make it possible for con-

scientious and competent attorneys properly to prepare and adequately represent affiant under such unusual circumstances, simply made it impossible to obtain counsel. This affiant contacted the following lawyers, each of whom were recognized as able, experienced, and counsel of the highest reputation in both the State Court's of Virginia and in the Federal Courts:

Leith S. Bremmer
A. Scott Anderson
David Satterfield, III
R. R. Ryder
Frank A. S. Wright

To corroborate the unusual circumstances here presented, affiant has obtained affidavits from these attorneys. Such affidavits make it clear that this affiant did not deal in subterfuge or delay. The simple fact is that the trial Court's refusal to grant any continuance made it impossible to obtain counsel. These reputable attorneys made it clear that in good conscience they could not enter the case under such unreasonable circumstances. It was a complicated case, involving several defendants, many corporations and involved factual data. The trial Court was fully aware of these factors and his adamant refusal to either grant continuance or to have a full hearing on this matter and make direct findings of fact as to whether this was as this affiant and the several eminent counsel clearly stated the facts to be or not!

Upon removal to Richmond, Virginia, proceedings commenced immediately and even though this affiant advised the trial judge fully of the terrible problem imposed by the adamant refusal of the Court to grant continuance to enable affiant to obtain counsel. The attitude of the prose-

cutor was the same as that of the trial Court. Knowing that affiant was being forced to act pro se, the prosecutor urged the Court to go right ahead with the impanelling of the jury, which was done! This affiant was having such extreme difficulty with his then counsel that communication between them was impossible. Affiant discharged this lawyer but the trial Court refused to allow the attorney to withdraw as counsel of record. The situation became so critical that counsel filed a petition for writ of mandamus to obtain personal relief and sought an emergency order from the Court of Appeals directing the trial judge to release counsel so that he could return to his home in Chicago, Illinois. Simultaneously the attorney was required to come to the courtroom while the trial progressed and sat outside the bar with the spectators! This affiant in his desperate effort to obtain counsel, having been told by each lawyer whom he could see, in seriatim fashion, that it would not be possible to come into the middle of such a serious and complicated case without a minimal continuance for some semblance of preparation, said affiant actually was forced during each day, while his case was going on, to walk the streets of Richmond and try to find lawyers in their office so that he could obtain counsel.

The prosecutors characterized this situation as an "eleventh hour" attempt by petitioner to delay the case. It must be pointed out that all the prosecutor need have done was seek a hearing on these unusual circumstances and it was the clear duty of the trial judge to have directed such a record hearing. The climax to this "process" came when affiant met in chambers with the Court of Appeals, having obtained the conditional appearance of Mr. Kinsey T. James of Washington, D.C., whom affiant had called at midnight being unable to engage any lawyer in Richmond, and in connection with the writ of mandamus filed by

Attorney Calihan, was advised by Judge Boreman (who was later on the panel hearing this case upon appeal) that: "half a lawyer is better than none"! Mr. Calihan was allowed to go home and Mr. James entered his conditional appearance and the case went right on, with no continuance being granted so that Mr. James could properly prepare and adequately represent this affiant.

The full facts are not of record in this case and this affiant earnestly and respectfully seeks the full consideration of this Honorable Court.

FURTHER AFFIANT SAYETH NOT.

/s/ C. Oran Mensik
C. Oran Mensik

Subscribed and sworn to
before me this 10th
day of May, 1968.
/s/ Genevieve B. Jarecki
Notary Public

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES THE BILL OF RIGHTS

Article V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

Right to Speedy Trial, Witnesses, Etc.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE XIV.

Citizenship Rights Not To Be Abridged.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 8 1968
JOHN F. DAVIS, CLERK

No. 275

In the

Supreme Court of the United States

OCTOBER TERM, 1968

~~D. SPENCER CROW and~~
C. ORAN MENSIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KINSEY T. JAMES
7521 Spring Lake Drive
Bethesda, Maryland
Attorney for Petitioner

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois